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In The

Supreme Court of The United States

October Term, 1997

State Division of Human Rights on the Complaint of:
CHARLES WILLIAMS,

Petitioner,

- against -

YELLOW FREIGHT SYSTEMS, INC., LOCAL UNION NO. 707, HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS, DOCKMEN AND HELPERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

PERCY W. BRISCOE
Attorney for Complainant
152 Old Post Road
Wappingers Falls, New York 12590
(914) 298-0522

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QUESTIONS PRESENTED FOR REVIEW

1. Did the U.S. District Court have the discretion to dismiss petitioner's case, filed pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sections 2000e et seq. and 42 U.S.C. Section 1981, which provides for equal rights of citizens, all without prejudice and costs to the parties, for his attorney's failure to prosecute case, without Petitioner's knowledge, consent, participation and prior personal notice to petitioner, when the Court had knowledge of petitioner's attorney not prosecuting the case, had pattern of not so doing and said attorney had a disbarment proceeding pending against him and was disbarred for same, all without petitioner's knowledge?

2. Did the United States District Court and United States Court of Appeals, for the Second Circuit have the discretion to dismiss petitioner's case without timely notice to petitioner's attorney and/or petitioner?

3. Did the United States District Court have the discretion to dismiss petitioner's case for failure of his attorney to communicate with the Court for over 6 months, when in fact, he had communicated with the Court, within, at least, 10 days to one month less than 6 months?

4. Did the U.S. District Court have the discretion to invoke such a drastic and harsh remedy of dismissal against the petitioner for his attorney's failure to prosecute his case, without his knowledge, consent and/or participation?

LIST OF PARTIES

The parties to the proceeding are:

Petitioner: Charles William

Respondents: Yellow Freight Systems, Inc.; Local Union No. 707, Highway and Local Motor Freight Drivers, Dockmen and Helpers International Brotherhood of Teamsters.

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PETITION FOR A WRIT OF CERTIORARI
PRELIMINARY STATEMENT

Petitioner, Charles Williams, petitions for Writ of Certiorari to review the Order of the United States District Court of Southern District of New York and Court of Appeals for the Second Circuit which affirmed the Order of the United States Court for the Southern District of New York, not to reopen petitioner's case, which was dismissed Without Prejudice and Costs to the parties.

OPINIONS BELOW

The Order of dismissal for failure to prosecute the case without prejudice and without costs to either party, by the United States District Court of the Southern District of New York, entered November 9, 1994, is unreported. The Order denying petitioner motion to reopen his case, because petitioner was unable to provide excusable neglect of his former attorney, by the United States District Court of the Southern District of New York, entered January 23, 1996, is unreported (A22). The Order denying the renewal and reargument to reopen the case, by the United States District Court of the Southern District of New York, entered July 19, 1996, is unreported (A24). The

Order affirming the Order of denial of the United States District Court of the Southern District of New York, by the United States Court of Appeals, for the Second Circuit, entered October 21, 1997, is unreported. (A28).

JURISDICTION

The Order sought to be reviewed was on October 21, 1997 (A28).

This Court's jurisdiction to review Order of the United States Court of Appeals for the Second Circuit, which affirmed the Order of the United States District Court of the Southern District of New York in favor of the respondent and against the petitioner, Charles Williams, reopening of his case, which was invoked pursuant to Sections 42 U.S.C. 2000e, et seq. and 42 U.S.C. 1981; 28 U.S.C. 2201, 1331, 1337, 1343.

This petition is timely filed within 90 days of the date the United States Court of Appeals for the Second Circuit affirmed the Order of denial of the United States District Court for the Southern District of New York to reopen petitioner's case, on October 21, 1997 (A28).

STATEMENT OF THE CASE

On or about February, 1982, the petitioner became employed by the respondent, Yellow Freight Systems, as an over-the-road-tractor-trailer driver. Petitioner's responsibilities included transport of freight from one freight company to another, among other things. The petitioner also became a member of Local Union 707 of the International Teamsters, virtue of being employed by Yellow Freight Systems, Inc.

Throughout petitioner's employment with the respondent, Yellow Freight Systems, Inc. he performed his duties in an exemplary manner. In fact, on or about February 4, 1992, the petitioner received the "Safe Driver Award" from said respondent, in recognition for years of safe driving by the petitioner for the respondent, Yellow Freight Systems, Inc.

On or about March 30, 1992, the petitioner was dispatched by the respondent, Yellow Freight Systems, on a trip from Maybrook, New York to Billerica, Massachusetts. Petitioner had been driving approximately three (3) hours from Maybrook, New York, when the L10 tractor trailer engine blew, while petitioner was in the vicinity of the eastern part of the State of Connecticut.

The engine was inspected by mechanics of both Local Union 707 and Yellow Freight Systems. The engine was disassembled by mechanics of Yellow Freight Systems, Inc. and was found to have blown because of the wear and tear on the engine, due to the millions of miles of usage thereon. The

Union's mechanics made the same determination, that the engine could not have blown by overrevving, but Yellow Freight Systems hired outside mechanics to inspect the engine and they opined that the engine blew because of overrevving the engine, even though it had a governor on it and the essential part for making a final determination was missing.

The majority of Arbitration Board decided against the petitioner, but did not address the difference in treatment of the petitioner and that of the other white drivers, who had had engines to blow with impunity.

On May 26, 1992 the petitioner was discharged from his employment, allegedly because the petitioner had overrevved the tractor trailer engine and caused it to blow.

The New York State Unemployment Compensation Board of Appeals determined that the petitioner did not blow the engine and had been, accordingly, discharged without cause, so he was granted unemployment compensation and same was paid, while he was unemployed.

The petitioner filed a discrimination complaint with the New York State Division of Human Rights and U.S. EEOC on November 9, 1992 (A-1). The U.S. Equal Employment Commission issued a " Notice of Right To Due " to the petitioner, on June 28, 1993 (A-34).

The petitioner duly filed his original complaint on July 30, 1993, well within the 90 days legal requirement, and

an amended complaint, pursuant to the U.S. District Court Order, on March 7, 1994 (A-4) and (A-14).

Upon information and belief, there were Court conferences on May 20, 1994 and June 8, 1994 (A-25). On November 9, 1994, the United States District Court of the Southern District of New York dismissed the petitioner's case without prejudice, for failure to prosecute the case and the petitioner's attorney had not communicated with the Court in over than six months.

The petitioner was not notified of the pending dismissal and/or the official dismissal of his case until about 6 months after the Court rendered such dismissal, and that was only after the petitioner's new attorney requested a status of his case.

Petitioner filed a motion to reopen the case on July 5, 1995, under FRCP 60 (b) (1), and in the interest of justice, in the good faith and mistaken belief, that since the case was dismissed without prejudice and that, in fact, petitioner's former attorney had communicated with the Court in less than six months, his case would readily be reopened. On January 23, 1996, the Court denied his motion on the grounds that petitioner failed to satisfy FRCP 60 (b) (1), by not providing a satisfactory excuse for the lack of petitioner's former attorney communicating with the Court in over 6 months (A-31).

On February 22, 1996, petitioner's attorney filed a motion for renewal and reargument of the motion to reopen case, mainly on the grounds that, according to

documents in file, there had been communication with the Court, within a period less than six months, by court conferences or other means; moreover, he nor the petitioner could not give an explanation for petitioner's former attorney's motive or conduct. But, on July 19, 1996, the United States District again, denied petitioner's motion for renewal and reargument to reopen the case, on the grounds, in substance, that the petitioner was responsible for his attorney's conduct (A-24). It, also, denied the motion on the grounds that the parties failed to follow through on providing the Court with a scheduling order, directed by the Court. Just one day before the case was dismissed, petitioner's former attorney wrote a letter, on November 8, 1994, asking the respondents to agree to the Court Scheduling Order and December 5, 1994 date for petitioner's deposition (A-32, A-33).

On December 19, 1996, petitioner, filed a timely Notice of Appeal and brief, in the United States Court of Appeals for the Second Circuit, wherein he, in substance, stated that it was a violation of his U.S. Constitutional rights to deny him a trial, under the Six Amendment of the United States Constitution, because he was not notified of the Court's pending decision to dismiss his case, and he was not notified of the official dismissal, by the Court, orally or in writing until about six months later, and then only upon the request, by petitioner's new attorney, for a status of his case. On or about October 21, 1997, the United States Court of Appeals affirmed the decision of the U.S. District Court, basically, because it held, that the petitioner was responsible

for the conduct of his attorney; that the failure to notify petitioner personally of the pending dismissal of his case was not necessary and the notice of the Court's official dismissal to his new attorney, upon his attorney's request, more than six months after the dismissal, satisfied the Court's responsibilities under the law (A-28). The petitioner disagreed with the Court's decision, pursuant to Federal Rule of Civil Procedure 77(d) among other things, whereupon he petitions this Court for A Writ of Certiorari.

REASONS FOR GRANTING WRIT OF CERTIORARI

THE DECISION BELOW PRESENTS IMPORTANT, UNANSWERED QUESTIONS AND CONFLICTS WITH SUPREME COURT, FEDERAL CIRCUIT COURT, STATUTORY AND CONSTITUTIONAL LAW

I

Courts' Refusal To Reopen Case Dismissed, Without Prejudice, For Attorney's Failure To Prosecute Case, Without Petitioner's Knowledge, Consent, Participation and Prior Personal Notice to Petitioner.

The petitioner was not aware of his attorney failure to prosecute his case. Petitioner had been informed by his attorney he was to take a deposition during the month of November or December, 1994 (A-32, A33). He had started preparing for same. The petitioner's case should not have been dismissed for his attorney's misconduct, especially, since he was not aware or notified of his

attorney's misconduct, the Court's intention to dismiss or having dismissed his case, until about six months after the dismissal; furthermore, if the court was going to dismiss the case, it should not have couched its decision in the form of dismissal without prejudice, when in fact it was with prejudice, because petitioner's case could have been timed barred under the statute of limitations, all of which mislead the petitioner in believing that his case could be reopened, because the order or decree, without prejudice, showed that the judicial act is not intended to be res judicata of the merit of the controversy, in this case the Court held otherwise.

The District Court erred in dismissing petitioner's case, without prejudice, under Federal Rules of Civil Procedure 41(b), for failure of prosecution, because statute of limitations could have prevented him from proceeding with his case. Boazman v. Economics Laboratory, Inc., 537 F2d 210, 13 BNA FEP Cas 434, 13 CCH EPD q. 11329, 22 FR Serv 2d 364. Moreover, in Pond v. Braniff Airways, Inc., 453 F2d 347, 4 BNA FEP cas 119, 4 CCH EPD q. 7604, 15 FR Serv 2d 966, the Appellate Court held that dismissal without prejudice for failure of the petitioner's counsel to prosecute case, by inadvertently neglecting to comply with pretrial court request for jury instructions, constituted abuse of judicial discretion, where effect of dismissal was to bar litigation on the merit because time for filing suit had expired and where plaintiff did not engage in contumacious delaying tactics.

In the case of Luna v. International Assoc. of Machinists & Aerospace Workers, 614 F2d 529, 22 BNA FEP Cas 525, 22 CCH EPD q. 30794, on remand (WD Tex.) 35 BNA FEP Cas 324, CCH EPD q. 33194, it was held that dismissal for failure to prosecute plaintiff's action, under 42 U.S.C. Sec. 2000e-5, was improper where degree of plaintiff's personal responsibility for delay was low, there was no substantial prejudice to the defendant and record did not indicate deliberate dilatoriness, even though plaintiff did not file and serve amended complaint in action until nearly two years after filing written general complaint. In the case at bar, the petitioner, himself was very actively proceeding and cooperating with his attorney. Petitioner was present at all of his appointments and visited on occasions without same. Any failure to prosecute or proceed in the case, if any, was due to the fault of petitioner's attorneys, all without petitioner's knowledge, consent and participation. The Court in Moore v. St. Louis Music Supply Co. 539 F2d 1191, 13 BNA FEP Cas 257, 12 CCH EPD q. 11129, 22 FR Serv 2d 149, held that, because the failure to prosecute Title VII claim was attorney's fault, and not the plaintiff's fault, the District Court's dismissal with prejudice was too harsh and would be reversed; and dismissal without prejudice would also be inappropriate because the statute of limitations for filing case had expired; the statute of limitations is not suspended during the period in which suit is pending; therefore, the judgment of dismissal was vacated and case was remanded for further proceedings.

II

Courts' Refusal To Reopen Case Dismissed Without Timely Notice to Petitioner.

According to the documents in file and otherwise, the parties' attorneys and the petitioner were not notified of the United States District Court's dismissal of petitioner's case. Under Federal Rule of Civil Procedure 77(d) the petitioner is entitled to a notice of judgment and orders of the federal court, so as to have an opportunity to be heard. FRCP 77(d), entitled, Notice of Orders or Judgments, states, in part, that "Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service papers." Default, within the meaning off FRCP 77(d), is defined in the case of Molloy v. Wilson, 878 F2d 313, 13 FR Serv 3d 1446. In that case the Court of Appeals held that, in civil right action, plaintiff was entitled to relief from dismissal of his action for lack of prosecution based on his failure to appear at mandatory status conference, where plaintiff had not received notice of dismissal as required under the Rule 77(d), the Court of Appeals, contrary to the District Court's conclusion that Rule was inapplicable, on grounds that plaintiff was in default for failure to

appear, asserted once that a party has appeared generally in an action, he is entitled to notice of all proceedings and actions taken thereafter.

In Radack v. Norwegian American Line Agency, Inc. 318 F2d 538, 7 FR Serv 2d 1139, 586 F2d 942, 26 FR Serv 2d 665, cert denied 440 U.S. 967, 59 L Ed 2d 783, 99 S Ct 1519, it was held that the Federal District Court had the power, in the exercise of sound discretion, to grant relief to plaintiffs who moved some fifteen (15) months after their action had been dismissed for lack of prosecution, for order vacating such dismissal, if notice of such dismissal had not in fact been sent to plaintiffs' attorneys. See Asby Enterprises, Ltd v. Weitzman, Dym & Associates,251 App DC 25, 780 F2d 1043, CCH Bankr L. Rptr q. 70922, 3 FR Serv 3d 1106; George M. Wright v. United States of America, Docket No. 85 Civ. 8050 (WCC), 1988 U.S. District Court Lexis 13336; Paddington Partners v. Jean-Louis Bouchard and Herbert A. Denton, 34 F3d 1132; Antioine B. Rinieri v. News Syndicate Co., 385 F2d 818, 822; Schenck v. Bear, Stearns & Co., 583 F2d 58; William Link v. Wabash Railroad Co., 370 U.S. 626.

Justice demands that petitioner, being the losing party, in the case at bar, be given an opportunity to appeal. Although Rule 77(d) provides that failure of the District Court to notify parties of entry of judgment does not extend time within which party may appeal, winning party cannot rely on judgment and losing party cannot make deliberate choice not to appeal if they do not know of entry of

judgment, and in these circumstances the purposes behind Rule 77(d) would not be served by denying losing party the privilege of appealing; moreover, justice demands that losing party be given that opportunity, and trial court may do so by vacating and re-entering judgment under 60(b)(6) to allow timely appeal when neither party had actual notice of entry of judgment. see, Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute, 163 App DC 140, 500 F2d 808, 18 FR Serv 2d 1549.

III

Courts' Refusal to Reopen Case Even Though It Mistakenly Believed That Communication With The Court Had Not Been Made By Attorney For Over 6 Months.

The petitioner was notified, for the first time in May 1995, that his case was dismissed on November 9, 1994, after an inquiry by his new attorney into the status of the case. The petitioner was not aware of his case not being actively prosecuted. In fact, he had been informed that he was being scheduled to give his deposition starting on or about December 5, 1994 (A-32, A-33). According to the documents in file and the docket sheet, there was a conference with the Court on May 20, 1994 and June 8, 1994, well within the 6 month period, on which the dismissal was based (A-25). The great weight of authority and the laws favor dispositions of litigations on their merits and dismissals are considered harsh sanctions to be resorted to only in extreme cases. Moreover, the dates

of the Court conferences cited in the Court Order of July 19, 1996, to wit: May 20, 1994 and June 8, 1994, were well within a six month period (A-25).

Just assume arguendo the petitioner's attorney did not communicate with the Court within six (6) months, such a period of time is not that unusual during discovery, as the case at bar. In fact, upon information and belief, in civil cases the lack of communication with the Court, during the period of discovery, many times are longer than 6 months. Counsel is quite aware of cases having been pending for longer than 6 months, without any communication with the U.S. District Court, during discovery, that have not been dismissed. Upon information and belief, as well as, upon public knowledge, the case of Paula Jones v. William J. Clinton, the President of the United States, alleging sexual harassment, has been pending for over seven (7) years, but it has not been dismissed. Petitioner is entitled to equal treatment under the laws of the United States, thus this was a violation of the petitioner's equal rights. Meeker v. Rizley 324 F2d 269, Becker v. Safelite Glass Corp. 244 F Supp 625; Durgin v. Graham, 372 F. 2d 130, cert den 388 U.S. 919; Davis v. Operation Amigo, Inc., 378 F. 2d 101; Marshall v. Sielaff, 492 F. 2d 917; Dyotherm Corp. v. Turbo Machine Co., 392 F. 2d 146, 434 F. 2d 65; Boazman v. Economics Laboratory, Inc., 537 F. 2d 210; "Court sua sponte may dismiss case with prejudice under Rule 41(b), but dismissal with prejudice is extreme sanction which should be used only where clear record of delay or contumacious

conduct by plaintiff exists." Jureczki v. Seabrook, 668 F. 2d 851, cert den 475 U.S. 1045; Rogers v. Kroger Co., 669 F. 2d 317; Cullen v. New York State Civil Service Co., 435 F. S. 546, 566 F. 2d 846, 618 F. 2d 226, cert den 483 U.S. 1021; Hamilton v. Neptune, 811 F2d 498.

The case at bar should not have been dismissed on the grounds of extreme circumstances. Upon information and belief, based on documents in file, the attorneys for the parties had a pretrial conference with the Court on May 20, 1994, before Judge Kimba M. Wood, wherein the Court ordered the parties to submit a stipulation clarifying, amending, or striking respondents' affirmative defenses on or before May 27, 1994 (A-21). The respondent, Local Union 707 was to submit a letter outlining its argument regarding this affirmative defenses of "unclean hands" on or before May 26, 1994 the petitioner was to respond on or before June 1, 1994; moreover, on June 8, 1994 the respondent, Local Union 707 were to initiate a conference call between the parties and chambers, which according to the docket sheet was done, to discuss any motion to dismiss its affirmative defenses and to establish a discovery schedule, all of which were well within the six month period before this case was dismissed (A-21). Moreover, the petitioner was not notified of such dismissal or of the Court's intention to dismiss the case for failure to prosecute the case.

The respondent, Local Union 707 cited the case of United States of America v. Salvator Cirami et al, 535 F2d

736, as precedent against reopening the case at bar. In that case, the plaintiff move for partial summary judgment. The defendants were served but no opposition was filed to plaintiff's motion for partial summary judgment. In this case all of the parties knew of the pending partial summary judgment, but filed no opposition thereto; furthermore that case was decided on the merits of the case. In the case at bar, it appears from the records that, there was no indication or notice of any pending dismissal either before, during or after such dismissal to petitioner or his former attorney, in fact, upon information and belief, on November 8, 1994, just one (1) day before this case was dismissed, without prejudice, the petitioner's attorney, in relying on the good faith belief that the court would continue the standard procedure of accommodating petitioner's case, they were scheduling a deposition for the petitioner, on December 5, 1994 or some other agreeable date, but the respondent did not respond (A-33). Moreover, the case at bar was decided, as if, petitioner's former attorney was not moving toward trial or settlement. The records and docket sheet clearly show that there were conferences with the Court on May 20, 1994 and June 8, 1994 (A-21). The Court can and should correct its mistake upon its own initiative. FRCP 60(a), entitled, Clerical Mistakes, asserts that:

> "Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time

of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court."

The United States District should correct its mistake upon its own initiative, in the interest of justice of the plaintiff's constitution rights, to a fair trial by jury. In Barkeij v. Ford Motor Co., 230 F2d 729, the Court under Rule 60(a) corrected its order by granting defendant's motions to proceed in forma pauperis. Relief was authorized, under FRCP 60(a), to correct the U.S. District Court's errors on its own initiative where it intended to grant new trial on certain grounds, but failed to include those grounds in its order by oversight or omission. United States v. Lyman, 125 F2d 67. The District Court should have corrected this oversight when petitioner's attorney first brought the error to its attention, in his Motion to Reopen the case, on July 5, 1995 or even now with leave from the U.S. Court of Appeals or this Court (A-24, A25).

Respondents cited the case of Samuel Nemaizer v. Jack Baker, 793 F. 2d 58, 62 (2d Cir. 1986) in opposition to the reopening of the case at bar. That case, to the contrary of the case at bar, was dismissed with prejudice. Here the parties in a written stipulation stated that the action was to be dismissed with

prejudice and without costs against either party and therefore, had the effect of a final adjudication on the merits favorable to the defendants and barred future suits brought by the plaintiff, upon the same cause of action. In the case at bar the action was dismissed by the Court, without prejudice, under the mistaken belief that petitioner's attorney had not communicated with the Court in over six months and was not prosecuting his case, all without any notice of dismissal to the petitioner or his attorneys; therefore, petitioner's attorneys was left working on the case without any knowledge of its dismissal and/or an opportunity to object to its dismissal or to move to reopen it.

IV

Courts' Refusal To Reopen Case, Even Though Dismissal Was Unnecessarily Harsh and Drastic Sanctions.

The Federal Rule of Civil Procedure 41(b) provides for alternative remedies far short of dismissals under certain circumstances in cases such as the case at bar. In the case of Industrial Bldg. Materials, Inc. v. Interchemical Corp., 437 F2d 1336, the Court held that "Rule 41(b) provides rather drastic remedy by which trial courts can penalize plaintiff, and while application of remedy rests within sound discretion of the court, it should be invoked only in extreme circumstances. In reviewing the propriety of dismissal under Rule 41(b), the Court of Appeals should look to see

whether District Court might have first adopted other less drastic alternatives. Moreover, it was held in Nevijel v. North Coast Life Ins., Co., 651 F2d 671, that the District Court's dismissal, pursuant to Rule 41(b) will be overturned on appeal only if the Court abused its discretion; though there are wide varieties of sanctions short of dismissal available, the Court need not exhaust them all, before dismissing a case and exercise of its discretion to dismiss requires only that possible and meaningful alternative be reasonable explored.

In the case at bar, there were no aggravating, contumacious or extreme circumstances to warrant dismissal, if sanctions were appropriate at all, they should have been minimal. The Court, in this case, dismissed it without prejudice, which was consistent with non-aggravating conduct by petitioner's attorney. The Courts had the option to invoke other forms of sanctions, but chose to invoke the ultimate punishment of dismissal, which was too harsh, drastic and extreme, under the circumstances.

Inasmuch as Rule 41(b) is harsh remedy, and sometimes fault lies with the attorney rather than the litigant, courts are reluctant to impose ultimate sanctions of dismissal, without prejudice; however, aggravating circumstances may make dismissal with prejudice appropriate. Schmidt v. Herrmann, 614 F2d 1221. Moreover, in the case of Hamilton v. Neptune, 811 F2d 498, it was held that dismissal of case with prejudice for want of prosecution was improper, since

district judge failed to warn plaintiff, personally, that dismissal was imminent and failed to consider alternative sanctions. The conduct of a party's attorney, without the knowledge and consent of the party should not reflect upon the result of the case of his client.

The great weight of authority and the laws favor dispositions of litigations on their merit and dismissals are considered harsh sanctions to be resorted to only in extreme cases. The cases that follow should be controlling in such circumstances: Meeker v. Rizley 324 F2d 269 Becker v. Safelite Glass Corp. 244 F Supp 625; Durgin v. Graham, 372 F. 2d 130, cert den 388 U.S. 919; Davis v. Operation Amigo, Inc., 378 F. 2d 101; Marshall v. Sielaff, 492 F. 2d 917; Dyotherm Corp. v. Turbo Machine Co., 392 F. 2d 146, 434 F. 2d 65; Boazman v. Economics Laboratory, Inc., 537 F. 2d 210; "Court sua sponte may dismiss case with prejudice under Rule 41(b) but dismissal with prejudice is extreme sanction which should be used only where clear record of delay or contumacious conduct by plaintiff exists." Jureczki v. Seabrook, 668 F. 2d 851, cert den 475 U.S. 1045; Rogers v. Kroger Co., 669 F. 2d 317; Cullen v. New York State Civil Service Co., 435 F. S. 546, 566 F. 2d 846, 618 F. 2d 226, cert den 483 U.S. 1021. The case at bar should not be dismissed on grounds of extreme circumstances and/or errors and omissions of the lower Court.

CONCLUSION

These Courts dismissed petitioner's case, without notifying or consulting him. It was the petitioner's case and he should have been considered and notified of the dismissal, so as to have an opportunity to correct the problem. It was the petitioner, who was discharged from his job, because of racial discrimination. It was the petitioner, who was unemployed for weeks, much of which was caused by the Teamster Union not protecting his interests, in his employment. It was the petitioner, who was so disgruntle about his mistreatment, by his employer, Yellow Freight Systems, Inc. and the Teamster Union, that he attempted to commit suicide, by shooting himself in the head. It was the petition, who suffered mental anguish and loss of many nights' sleep. It was petitioner, who paid to have his case prosecuted. It was the petitioner, who was waiting for about two (2) years to get redress. It was petitioner, who steadfastly went before the arbitration board to resolved his complaint, in which the racial discrimination issue was not addressed. It was the petitioner, who appealed to the Unemployment Compensation Board to get unemployment compensation and to clear his name, of which the board found that he was not discharged for cause and compensation was paid. Yes, it was the petitioner, who stood by and saw his white co-workers having engines to blow without any penalties therefor, even the head of the local Teamsters Union had, at least, one engine to blow, but they weren't discharged. Yes, the petitioner, who had the most profound interest in his

case, was not even considered or notified by the U.S. District Court of the pending and ultimate dismissal of his case, even though it had knowledge of his whereabout. Many of the U.S. District Courts inform the parties directly about the status of their cases, if their cases are in jeopardy of being dismissed, which appears to be sound policy and is within the Six Amendment to the U.S. Constitution, that guarantees all citizens a right to a fair trial on the merit. Many U.S. District Courts notify the moving parties of the status of their, as a matter of course. Civil rights cases should not be an exception to the general rule. The petitioner has a constitutional right to a trial, under the Six Amendment of the U.S. Constitution. The petitioner is a poor working black man, yet he has to fight the big wealthy and powerful trucking company and Teamsters Union, with all of their wealth, power and influence , for the rights his white co-workers take for granted.

If minorities, in America, who are discriminated against are going to be denied their constitutional rights by the Courts, their complaints are not going to be addressed, then they will have no other recourse, except for public protest or some other unacceptable means of protection. Our Courts are under a duty to protect the interests of all the people in our country. Many of our citizens, in this country are loosing faith in our government and are increasingly relying upon the courts to solve their problems and protect them. If our courts refuse to permit our people to

litigate their cases, either because of courts' scheduling and/or calendar considerations, as against the U.S. Constitution, which give us a right to a fair trials, what options do our citizens have. Failing this our country, which possesses all our hopes and inspirations for a great democracy, will surely be doom to failure.

For the reasons above stated, it is respectfully requested that the United States District Court's Order, which was affirmed by the U.S. Court of Appeals, for Second Circuit, denying the reopening of petitioner's case, be reversed and the petitioner be given an opportunity to a fair trial on the merits of his case, in the interest of justice and in accordance with the Six Amendment of the U.S. Constitution. The petitioner's attorney's conduct and/or reputation should not be used to penalize the petitioner, who has a very strong case against the respondents.

Dated: Wappingers Falls, New York
January 9, 1998

Respectfully submitted,

Percy W. Briscoe

Percy W. Briscoe
Attorney for Petitioner
152 Old Post Road
Wappingers Falls, New York 12590
(914) 298-0522

STATE OF NEW YORK: EXECUTIVE DEPARTMENT

STATE DIVISION OF HUMAN RIGHTS
EXEC. LAW ART.,15

SDHR COMPLAINTS NO:

State Division of Human Rights on the Complaint of:
Charles Williams

Complainant

- against -

Yellow Freight Systems, Inc.;
International Brotherhood of
Teamsters Local No. 707

Respondents

TITLE VII/ADF-A EEOC CHARGE NO:

I, Charles Williams
Residing at: 629 Fishkill Avenue Beacon New York 12508
Tel. No. (914) 831-5558 charge the above named respondent (s) whose address is 1000 Homestead Drive Maybrook New York 12543-0000 Telephone No. (800)845-9740 with an unlawful discriminatory practice relating to employment in violation of Article 15 of the Executive Law of the State of New York Human Rights Law because of Race (x) color (x) Creed/Religion ( ) National origin ( ) Sex ( ) Pregnancy ( ) Age ( ) Physical or Mental Handicap ( ) Marital Status ( ) Familial Status Prior Arrest Record and/or Convictions opposed Discrimination Retaliation ( )

Date most recent or continuing discrimination took place
May 6, 1992

The particulars are:

1. I am a black person. I had been employed by the above named respondent, Yellow Freight Systems, Inc. since February 1982, as a over the road truck driver. I am a member of the International Brotherhood of Teamsters, Local 707.

2. On or about March 30, 1992, an incident occurred for which was investigated by respondent and for which I was terminated on May 6, 1992.

3. Upon information and belief, I believe my Union did not adequately represent me and I believe if I were white the Union would have reversed the termination of my employment.

4. Upon information and belief, I believe there have been other, white, drivers who have had similar, worse or multiple incidents who are still employed by respondent and I believe if I were white I would still be employed by respondent.

5. I am black person. Based on the foregoing, I charge the above named respondents with having discriminated against me by denying me equal terms, conditions and privileges of employment by terminating my employment and denying me adequate representation because of my race and color in violation of the Human Rights Law of the State of New York.

"I have not commenced any other civil or criminal action, nor do-I have an action pending before any administrative agency under any other of this state based upon this same unlawful discriminatory practice".

I also charge the above named respondent (s) with violating Title VII of the Civil Rights Act of 1964, as amended (covers race, color, national origin, sex relating to employment) and hereby authorize SDHR to accept this verified complaints of behalf of EEOC subject to the statute, limitations contained in Title VII.

STATE OF NEW YORK) ss:
COUNTY OF DUTCHESS

Charles Williams

Charles Williams, being duly sworn, deposes and says: that he/she is the complainant herein: that he/she has read (or had read to him/her) the foregoing complaint and knows the content thereof; that the same is true of his/her own knowledge except as to the matters therein stated on information and beliefs; and that as to those matters he/she believes the same to be true.

Subscribed and sworn to before me
this 9th day of November 1992

Charles Williams

Signature of Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHARLES WILLIAMS,

Plaintiff,

COMPLAINT
TRIAL BY JURY
DEMANDED

-against-

Civil Action No.:

YELLOW FREIGHT SYSTEMS, INC.; LOCAL UNION NO. 707, HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS,. DOCKMEN AND HELPERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, and JOHN SEXTON, Individually and in His Capacity as Supervisor for Yell Freight Systems,

Defendants.

---------- x

Plaintiff, by his attorney, C. Vernon Mason, Esq., as and for his Complaint, alleges as follows:

PRELIMINARY STATEMENT

1. This is an action for declaratory relief, injunctive relief, back pay, compensatory damages and punitive damages and other relief to redress discrimination in the terms, conditions and privileges of employment arising out of the defendant's discrimination of plaintiff on the basis of race and color.

2. Plaintiff files this action pursuant to Title VII of the Civil Rights Act of 1964, as amended and 42 U.S.C. §

2000e et seq. In addition, plaintiff seeks relief under 42 U.S.C. §1981, providing for equal rights of citizens and all persons within the jurisdiction of the United States.

JURISDICTION

3. The jurisdiction of this court, as to the Federal claims invoked, is pursuant to 28 U.S.C. §§ 1331, 1337, 1343 and 2201.

4. Plaintiff timely filed a charge of discrimination with the State of New York, State Division of Human Rights and the Equal Employment Opportunity Commission on November 9, 1992 (Exhibit A).

5. The unlawful employment practices alleged below were committed within the Southern District of New York.

6. Said charge of discrimination charged the defendant with violation of Title VII of the Civil Rights Act of 1964, as amended, thereby protecting plaintiff's right to proceed in a Federal action.

7. Upon information and belief, defendant Yellow Freight Systems, Inc., is an employer within the meaning of 42 U.S.C. § 2000e et seq. in that said defendant is engaged in an industry that employs more than four hundred (400) persons.

8. Upon information and belief, defendant union, Local 707, Highway and Local Motor Freight Drivers, Dockmen and Helpers, International Brotherhood of Teamsters is a union affecting interstate commerce organized and existing under the laws of the State of New York.

9. On June 8, 1993, at the request of plaintiff's attorney, the Equal Employment Opportunity Commission (EEOC) issued a "Notice of Right to Sue" (Exhibit B). This complaint is filed within ninety (90) days of the receipt thereof.

PARTIES

10. Plaintiff, Charles Williams, is a Male of African - American descent and a member of the class of persons intended to be protected under 42 U.S.C. §§ 1981 and 2000e et seq.

11. Defendant Yellow Freight Systems, Inc. (hereinafter referred to as ("Yellow Freight"), is a business operating and existing under the laws of the United States and the State of New York, located at 1000 Homestead Drive, Maybrook, New York 125430000.

12. Defendant Local Union No. 707, Highway and Local Motor Freight Drivers, Dockmen and Helpers, International Brotherhood of Teamsters (hereinafter referred to as "Local 707") is a union organized and existing under the laws of the State of New York.

13. Defendant John Sexton is a supervisor and an employee for the defendant Yellow Freight.

14. At all times hereinafter mentioned, and at the time of the commencement of this action, plaintiff was and is a resident of the State of New York, County of Dutchess and a citizen of the United States.

STATEMENT OF CLAIM AND FIRST CLAIM FOR RELIEF UNDER FEDERAL LAW

15. The defendant has intentionally engaged in unlawful employment practices and policies in violation of 42 U.S.C. § 2000e et seq. Said defendant Yellow Freight engaged in patterns and practices of discrimination against the plaintiff, with respect to the terms, conditions and privileges of employment because of plaintiffs race and color, in violation of the above stated sections of Federal law.

16. In February of 1982, plaintiff became employed by the defendant as an over-The-Road truck driver. Plaintiff transported freight from one Yellow Freight Company to another.

17. Throughout plaintiff's employment by the defendant, plaintiff performed his duties in an exemplary manner. On February 4, 1992, plaintiff received a Safe Driver Award for safe driving for the past eight (8) years.

18. On March 30, 1992, plaintiff was dispatched on a run from Maybrook, New York to Billerica, Massachusetts. Plaintiff had travelled approximately three (3) hours from Maybrook, New York when his L10 engine blew in the vicinity of Exit 70 and I-84, Eastern Connecticut.

19. Plaintiff was towed back to Maybrook where mechanics for defendant Yellow Freight disassembled the engine and inspected said engine. Union Local 707 mechanic, Bobby Booth, stated that the engine blew, not because of any wrongdoing on the part of the plaintiff such as "overrevving" or gunning the engine while speeding downhill, but because of wear and tear on the engine by overuse.

20. Defendant Yellow Freight, its agents and/or employees, inspected the blown L10 engine, which defendant had been having difficulty with.

21. Defendant Yellow Freight brought in two (2) mechanics a) Jim Reynolds, President of Prime Power and b) Joseph Hague, Distributor Field Service Manager for Cummins Metro Power, to inspect the Ll0 engine and consult with defendant Yellow Freight's in house mechanic Brian Stanley. William Cutler, also a mechanic, was present on behalf of plaintiff.

22. Mr. Cutler's conclusion after inspection of the L10 engine was consistent with the report of the union mechanic, Bobby Booth, that plaintiff could not have blown the engine by "overrevving" said engine. The engine blew

due to wear and tear from overuse, it was not the fault of plaintiff.

23. The reports of Joseph Hague and Jim Reynolds to defendant Yellow Freight stated, contrary to Mr. Booth's and Mr. Cutler's conclusions, that the engine was blown deliberately by being overspun by plaintiff.

24. Upon information and belief Bobby Booth's work sheet report was given to Brian Stanley defendant Yellow Freight's in house mechanic to complete. Mr. Stanley stated to plaintiff's supervisor, John Sexton, that plaintiff had overspun the engine, therefore plaintiff was subject to dismissal.

25. Brian Stanley had his own mechanic search the blown engine for the timing link but because the engine had been "broken down" (disassembled), the information on the timing of the blown engine was lost.

26. On May 6, 1992, upon receipt of the findings of the investigation regarding the blown L10 engine, plaintiff was called into the office of George P. Bull, Assistant Linehaul Operations Manager and told that the investigation had been completed and plaintiff was found to be at fault for the "reckless act" of blowing the L10 engine. Plaintiff was immediately discharged.

27. Plaintiff states that he was treated in a disparate manner from his white counterparts in that several other over the road truck drivers had blown engines at least once but they received no reprimand either verbal or written and are still employed by defendant Yellow Freight. Plaintiff states that his driving record was excellent.

28. Due to plaintiff's termination and the poor

handling of his case by his union, plaintiff has been unable to obtain another job as a truck driver. Upon information and belief, plaintiff's supervisor, defendant John Sexton, has been informing prospective employers, incorrectly, of plaintiff's termination for reckless driving.

29. On information and belief, none of the plaintiff's white male counterparts, who had blown one or more engines, had been subjected to an investigation, or any other form of scrutiny after they had reported that an engine had been blown.

30. On November 9, 1992, plaintiff filed a complaint with Dutchess County Human Rights Commission and EEOC alleging that the defendants engaged in a pattern and practice of discrimination in the terms, conditions and privileges of plaintiff's employment with Yellow Freight in violation of the Civil Rights Act.

STATEMENT OF NEW YORK STATE COMMON LAW CLAIMS FOR RELIEF

31. Plaintiff repeats and realleges each and every allegation in paragraphs I through 30 above as if fully set forth herein.

32. Defendant John Sexton and/or other agents of defendants stated that plaintiff had been terminated because he had been reckless driving.

33. Defendants' actions in subjecting plaintiff to a segregated, subjective, arbitrary, capricious and discriminatory standard in terminating plaintiff's employment, constitutes the intentional and/or negligent infliction of emotional and psychological harm, humiliation and embarrassment and interference with a business

opportunity.

34. Defendants' actions in publishing the false statement that plaintiff was terminated for reckless driving constitutes slander, defamation of character, the casting of plaintiff in a false light and the intentional and/or negligent infliction of emotional and psychological harm, humiliation and embarrassment and interference with a business opportunity.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgement against the defendants as follows:

1. A declaratory judgment that the defendants engaged in a pattern and practice of discrimination and violated plaintiff Is rights under federal law and New York State Common Law in that the defendants failed to provide the plaintiff with equal terms, conditions and privileges of employment;

2. Injunctive relief permanently restraining and enjoining the defendants for failing to provide plaintiff with equal terms, conditions and privileges of employment, on the basis of his race and color and reinstating plaintiff to his employment with defendant and further in instating plaintiff to the position of over the road truck driver with all salary and benefits retroactive to May 6, 1992;

3. Judgment for compensatory damages to plaintiff in excess of $5,000,000.00 (FIVE MILLION DOLLARS) for:

a. The deprivation by the defendants of plaintiff's right to equal terms, conditions and privileges of

employment without regard to race and color,

b. The intentional infliction and/or negligent infliction of emotional and psychological harm, humiliation and embarrassment, interference with a business opportunity, slander, defamation of character and the casting of plaintiff in a false light;

4. Judgment for punitive damages in excess of $10,000,000.00 (TEN MILLION DOLLARS) for the defendants' willful, intentional and malicious acts directed at plaintiff because of his race and color;

5. Court costs and reasonable attorneys fees;

6. Such other and further relief as the Court may deem just and proper.

A Trial By Jury Is Demanded.

Dated: New York, New York
July 30, 1993

C. VERNON MASON, ESQ.
Attorney for Plaintiff
401 Broadway, Suite 1108
New York, New York 10013
(212) 219-0147

CERTIFICATION

STATE OF NEW YORK }

COUNTY OF NEW YORK } ss.:

I, CHARLES WILLIAMS, being duly sworn depose and say:

I have read the foregoing COMPLAINT. The contents of said COMPLAINT are true and accurate to my own knowledge, except for matters stated to be upon information and belief, in which case I believe those matters to be true.

CHARLES WILLIAMS

Sworn to before me
this 30th day of
July, 1993.

NOTARY PUBLIC

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- x

CHARLES WILLIAMS,

93 Civ 5491 (KW)

Plaintiff,

-against-

YELLOW FREIGHT SYSTEMS, INC., LOCAL UNION NO. 707, HIGHWAY AND COMPLAINT LOCAL MOTOR FREIGHT DRIVERS, DOCK- MEN AND HELPERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Defendants.

---------- x

Plaintiff, by his attorney, C. VERNON MASON, as and for his Complaint, alleges:

PRELIMINARY STATEMENT

1. This is an action for declaratory relief, injunctive relief, back pay, compensatory damages and punitive damages and other relief to redress discrimination in the terms, conditions and privileges of employment arising out of the defendants, discrimination of plaintiff on the basis of race and color.

2. Plaintiff files this action pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. In addition, plaintiff seeks relief under 42 U.S.C. § 1981, which provides for equal rights of citizens and all person within the jurisdiction of the United States.

JURISDICTION

3. The jurisdiction of this Court, as to the Federal claims invoked, is pursuant to 28 U.S.C. 1331, 1337, 1343 and 2201.

4. Plaintiff timely filed a charge of discrimination with the New York State Division of Human Rights, on or about November 9, 1992 (Exhibit "All).

5. The unlawful employment practices alleged below were committed within the Southern District of New York.

6. Said charge of discrimination charged the defendants with violations of Title VII of the Civil Rights Act of 1964, as amended, thereby protecting plaintiff's right to proceed in a Federal action.

7. On June 8, 1993, at the request of plaintiff's attorney, the Equal Employment Opportunity Commission (EEOC) issued a "Notice of Right to Sue" (Exhibit "Bl') . The original complaint in this action was filed within ninety (90) days of the
receipt thereof.

PARTIES

8. Plaintiff, Charles Williams, is a male of African descent and a member of the class of persons intended to be protected under 42 U.S.C. §§ 1981 and 2000e et seq.

9. Upon information and belief Defendant Yellow Freight Systems, Inc. (hereinafter referred to as "Yellow Freight") is a business operating and existing under the laws of the United States and the State of New York, with its principal place of business located in Maybrook, New York.

10. Upon information and belief, Defendant Union, Local 707, Highway and Local Motor Freight Drivers, Dockmen and Helpers, International Brotherhood of Teamsters (hereinafter referred to as "Local 707") is a union organized and existing under the laws of the United States, with its principal place of business located in the State of New York.

11. Upon information and belief, said defendants are persons within the meaning of 42 U.S.C. § 1981 and fall within the ambit of 42 U.S.C. § 2000e because they are engaged in industries affecting commerce and employ more than 100 persons.

STATEMENT OF CLAIM FOR RELIEF UNDER FEDERAL LAW

12. The defendants have engaged in unlawful discriminatory practices and policies in violation of U.S.C. 1981 and 2000e et seq. with respect to the terms, conditions, and privileges of employment and union benefits because of plaintiff's race and color, in violation of the above stated sections of Federal law.

13. In or about February of 1982, plaintiff became employed by the defendant Yellow Freight as an over-the-road truck driver and simultaneously became a member of defendant Union Local 707.

14. Plaintiff's responsibilities included the transport of freight from one Yellow Freight Company to another.

15. Throughout plaintiff's employment with defendant Yellow Freight, plaintiff performed his duties in an exemplary manner. On February 4, 1992, plaintiff received the "Safe Driver Award" from defendant Yellow Freight in

recognition for years of safe driving by plaintiff for defendant Yellow Freight.

16. On or about March 30, 1992, plaintiff was dispatched by defendant Yellow Freight on a run from Maybrook, New York to Billerica, Massachusetts. Plaintiff had travelled in defendant Yellow Freight's truck, for approximately three (3) hours from maybrook, when the L10 engine in said truck "blew" while plaintiff was in the vicinity of eastern Connecticut.

17. The truck had to be towed back to Maybrook where mechanics for defendant Yellow Freight disassembled the engine thereof and inspected same. A Local 707 mechanic inspected the said engine and opined that the engine had blown, not because of any wrongdoing on the part of the plaintiff such as "overrevving" or "gunning" the engine while speeding downhill, but because of the wear and tear on the engine caused by overuse.

18. Defendant Yellow Freight had two (2) mechanics inspect the L10 engine and consult with defendant Yellow Freight's in-house mechanic. Plaintiff also had a mechanic inspect the subject engine.

19. The mechanic who inspected the engine at plaintiff's request agreed with defendant Local 707's mechanic, that plaintiff could not have blown the engine by "overrevving" and said engine blew as a result of wear and tear caused by overuse.

20. The mechanics who inspected the engine on behalf of defendant Yellow Freight concluded that the engine was blown by plaintiff deliberately overrevving it.

21. Upon receipt of the findings of the

investigation regarding the blown L10 engine, on or about May 26, 1992, plaintiff was called into the office of George P. Bull, Assistant Linehaul Operations Manager for defendant Yellow Freight and told that the investigation had been completed and plaintiff was found to be at fault for the "reckless act" of blowing the L10 engine. Plaintiff was immediately discharged from his employment with defendant Yellow Freight.

22. The discharge of plaintiff by defendant Yellow Freight constitutes a violation of Federal Law because plaintiff was treated in a disparate manner from his white counterparts. Several other over-the-road truck drivers have blown engines at least once, but they were not even reprimanded, let alone discharged, by defendant Yellow Freight. These employees of defendant Yellow Freight, who upon information and belief are of European descent, are still employed by defendant Yellow Freight.

23. Defendant Union Local 707 perpetuated the discriminatory actions to which plaintiff was subjected by failing to attempt to get plaintiff back to work pending the investigation and determination of the engine failure, as it does with similarly situated union members of European descent.

24. Defendant Union Local 707 continued its discrimination against plaintiff by failing to attempt to find other employment for plaintiff after plaintiff's discharge from Yellow Freight as it does with similarly situated union members of European descent. Said failure of defendant Local 707 continues to harm plaintiff to this date.

PRAYER FOR RELIEF

WHEREFORE, plaintiff demands judgment against

defendants as follows:

1. A declaratory judgment that the defendants Yellow Freight and Local 707 engaged in a pattern and practice of discrimination in violation of plaintiff's rights under federal law;

2. Injunctive relief permanently restraining and enjoining the defendants Yellow Freight and Local 707 from engaging in patterns and practices of discrimination and directing defendant Yellow Freight to reinstate plaintiff to his employment with defendant Yellow Freight in the position of over-the-road truck driver with all salary and benefits retroactive to May 6. 1992;

3. Judgment for compensatory damages to plaintiff in excess of $1,000,000.00 (ONE MILLION DOLLARS) for the deprivation by the defendants of plaintiff's rights to equal terms, conditions and privileges of employment and union benefits. without regard to race and color;

4. Judgment for punitive damages in excess of $3,000,000.00 (THREE MILLION DOLLARS) for the defendants' willful, intentional and malicious acts directed at plaintiff because of his race and color;

5. Court costs and reasonable attorneys fees;

6. Such other and further relief as the Court may deem just, equitable, and proper.

A TRIAL BY JURY IS DEMANDED.

Dated: New York, New York
March 7, 1994

C. VERNON MASON, ESQ.
Attorney for Plaintiff
401 Broadway, Suite 1108
New York, New York 10013
(212) 219-0147

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHARLES WILLIAMS,

93 Civ. 5491

Plaintiff, ORDER

-against-

YELLOW FREIGHT SYSTEMS INC.,, et al.,,

Defendants.

---------- x

WOOD: D.J.

As agreed to by the parties in a conference May 20, 1994, the parties shall submit a stipulation clarifying, amending, or striking certain affirmative defenses on or before May 27, 1994. Defendant Local 707 shall submit a letter outlining its argument regarding its affirmative defense of "unclean hands" on or before May 26, 1994. Plaintiff shall respond on or before June 1, 1994. On June 8, 1994 at 10:00 am, defendant Local 707 shall initiate a conference call between the parties and chambers to discuss any motion to dismiss its affirmative defense and to establish a discovery schedule.

SO ORDERED.

DATED: New York, New York
May 20, 1994

Kimba M. Wood

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES WILLIAMS,

Plaintiff,

-against-

93 CIV. 5491 (KMW)
ORDER

YELLOW FREIGHT SYSTEMS. INC., LOCAL UNION 707, HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS, DOCK-MEN AND HELPERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AND JOHN SEXTON, Individually and in his capacity as supervisor for Yellow Freight systems,

Defendants.

WOOD, U.J.

In an Order dated November 9, 1994, I dismissed this action without prejudice for failure to prosecute pursuant to Fed. R. Civ. P. 41 after plaintiff failed to communicate with the court for over six months. Eight months after I issued that order, plaintiff, represented by new counsel, has brought a motion to reopen this case pursuant to Fed. Rule of Civ. P. 60(b)(1).

Rule 60(b) of the Federal Rules of Civil Procedure provides, in relevant part, that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence,

surprise, or excusable neglect.....

Plaintiff, however, does not even allege any excuse for the six month lapse in communicating with this court. In support of his motion, plaintiff presents an affirmation from his new attorney and an affidavit from himself. Both of these documents simply state that on January 28, 1995, plaintiff learned that his former attorney had been disbarred and allege reasons that plaintiff did not bring this motion to reopen any sooner then he did. Thus, no excuse is provided for the six month lapse in communicating with this court before the case was dismissed on November 9, 1994.

If plaintiff is attempting to allege indirectly that the negligence of his former attorney resulted in the failure to prosecute his case, even such a claim, without more, would be insufficient to provide the basis for setting aside the dismissal. The Second Circuit has consistently declined to relieve clients under Rule 60 (b)(1) of the "burden of .... final judgment [] entered against [them] due to the mistake or omission of [their] attorn[ies] by reason of the Intter's ignorance of the law or other rules of the court, or [their] inability to efficiently manage [their] caseload[s]." United States v. Cirami, 535 F.2d 736, 739 (2d Cir. 1976). Plaintiff "voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." Link v. Wabash Railroad Co., 370 U.S. 626, 633-34 (1962).

Plaintiff's motion to reopen this case is denied.
SO ORDERED.

DATED: New York, New York, January 23, 1996

Kimba M. Wood
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CHARLES WILLIAMS,

Plaintiff,

-against-

93 CIV. 5491 (KMW)
ORDER

YELLOW FREIGHT SYSTEMS, INC., LOCAL UNION 707, HIGHWAY - AND LOCAL MOTOR FREIGHT DRIVERS, DOCK-MEN AND HELPERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, AND JOHN SEXTON, Individually and in his capacity as Supervisor for Yellow Freight Systems,

Defendants.

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WOOD, D.J.

In a November 9, 1994 order, I dismissed this action without prejudice for failure to prosecute pursuant to Fed. R. Civ. P. 41. Eight months after I issued that order, plaintiff, represented by new counsel, brought a motion to reopen this case pursuant to Fed. Rule of Civ. P. 60(b)(1). On January 23, 1996, I issued an order denying plaintiff's motion to reopen this case on the basis of the fact that plaintiff did not allege any excuse for the lapse in communicating with this court that resulted in the dismissal. Now, more than fifteen months after the dismissal of this action for failure to prosecute, plaintiff has brought a motion which he styles a "motion for renewal and reargument of motion to reopen case."

Plaintiff again fails to allege any excuse for the lapse in communication with this court. Plaintiff simply states that:

> "a review of plaintiff's files show that the plaintiff's attorneys were in communicate (sic) with the court within the six months before the case was dismissed, in fact, according to the documents in file [sic] there was a conference with the Court and the defendant's attorneys on May 20, 1994, well within the six month period, and there are indications that contacts were made with this Court, between May 20, 1994 and November 9, 1994, the date of the dismissal."

Pl.'s Feb. 19, 1996 Aff. at ¶ 6.

What plaintiff does not state, perhaps because plaintiff Is new counsel is unaware of the actions of plaintiff Is former counsel, is the nature of these contacts with the court. On May 20, 1994, I conducted a conference at which the parties were directed, inter alia, to submit a stipulation amending defendant's affirmative defenses by May 27, 1994. I issued an order on May 20, 1994 embodying that order and instructing the parties that a telephone conference with the court would be held on June 8, 1994. The parties did not submit the stipulation on May 27, 1994 as they had been directed. [1] On June 8, 1994, another telephone conference was held at which parties were directed to submit the

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[1] Plaintiff has submitted a letter sent by plaintiff to defendants on May 23, 1994 enclosing a proposed stipulation. Pl.'s Feb. 19, 1996 Aff., Exh. 3. Plaintiff has also submitted a letter sent by defendants to plaintiff by facsimile on May 26, 1994 requesting minor changes in the stipulation. Pl.'s Feb. 19, 1996 Aff., Exh. 2. Plaintiff alleges no excuse for the fact that plaintiff failed to incorporate these minor changes and submit the stipulation to the court.

stipulation amending the affirmative defenses and dismissing Local 707 by June 20, 1994. At that conference, parties were also told that another conference call would be held on June 20, 1996. Parties again failed to submit the stipulation on June 20, 1994 and failed to initiate the telephone conference. Thus, no conference was held. on September 20, 1994, still having received no stipulation, my chambers called plaintiff's counsel and directed him to submit a proposed scheduling order by September 23, 1994. No such proposed order was ever received by my chambers. On October 12, 1994, my chambers called plaintiff Is counsel and informed him that this action would be dismissed if the court did not receive a proposed scheduling order and discovery plan from him. My chambers again received nothing from plaintiff.[2] On November 9,, 1994, after (1) these repeated attempts to get plaintiff to comply with my orders, (2) after months of failure of the plaintiff to submit any document with respect to his case, as repeatedly required by this court, and (3) after duly warning plaintiff that his case would be dismissed if the court did not receive a proposed scheduling order and discovery plan from him, I dismissed this action without prejudice.[3]

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[2] Plaintiff has submitted a November 8, 1996 letter from plaintiff to defendants enclosing a proposed scheduling order for review of defendants. Pl.'s Feb. 19, 1996 Aff., Exh. 5. Plaintiff does not make any allegations with respect to why he waited so long prepare this proposed scheduling order or why he did not follow through on getting the scheduling order to the court.

[3] Plaintiff states without presenting any proof, that the court dismissed the case without any notice of dismissal to the plaintiff or his attorneys." pl.'s Mem. of Law at p. 4. Because plaintiff is now represented by new counsel, his new counsel may be unaware that this statement is untrue. First, my chambers contacted plaintiff's then counsel on October 12, 1994 to inform him that if he did not take

The conduct of plaintiffs former counsel in this action went far beyond mere failure to communicate with the court. Plaintiff' s former counsel repeatedly and flagrantly disobeyed this court's orders, even in the face of a warning that this case would be dismissed if he continued to fail to comply with my orders and continued to fail to prosecute this action. This conduct constitutes the type of extreme conduct with which Fed. R. Civ. P. 41(b) was designed to deal. In failing to allege any excuse for this conduct, plaintiff has not met the requirements of Fed. R. Civ. P. 60(b).

I deny plaintiff's motion to reargue the motion to reopen this action.

SO ORDERED.

DATED: New York, New York
July 19,1996

Kimba M. Wood
United States District Judge

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certain actions to prosecute his case, it would be dismissed. Second, the order of dismissal issued on November 9, 1994 was sent to counsel for plaintiff and defendants respectively.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of October, one thousand nine hundred and ninety-seven.

BEFORE: HONORABLE FRANK X. ALTIMARI
HONORABLE FRED I. PARKER
HONORABLE DAMON J. KEITH,*
Circuit Judges.

* Of the United States Court of Appeals for the Sixth circuit, sitting by designation.

CHARLES WILLIAMS,

Plaintiff-Appellant,

V. No. 96-9694

YELLOW FREIGHT SYSTEMS, INC.; LOCAL UNION NO. 707, HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS, DOCKMEN AND HELPERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Defendants-Appellees.

APPEARING FOR APPELLANT:
Percy W. Briscoe, Wappingers Falls, NY

APPEARING FOR APPELLEE: (Yellow Freight Systems)
Jeffrey I. Pasek, Cozen & O'Connor,
Philadelphia, PA

APPEARING FOR APPELLEE: (Local Union No. 707):
Larry Cary, Vladek, Waldman, Elias
& Engelhard, P.C., New York,NY

Appeal from the United States District Court for the Southern District of new York (Kimba M.Wood, Judge).

This cause came to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court is AFFIRMED.

Charles Williams appeals from the judgment of the United States District Court for the Southern District of New York (Kimba M. Wood, Judge) dismissing his claims under Title VII of the Civil Rights Act of 1964, 42 U. S.C. § 2000e et seq. After Williams's previous counsel repeatedly failed to respond to the court's orders, the court dismissed the case without prejudice, for failure to prosecute, pursuant to Fed. R. Civ. P. 41(b). The court refused to reinstate William's complaint, pursuant to Fed. R. C-iv. P. 60(b)(1), because he did not allege or prove that the dismissal resulted from "excusable neglect" on the part of his previous attorney. Williams argues that dismissal was improper because his attorney was actively prosecuting the case and, in any event, dismissal was too harsh a sanction. He also claims that he should have been afforded personal notice of the dismissal.

We have reviewed the record, including the district court orders challenged by Williams, and find Williams's argument to be without merit, We accordingly AFFIRM the judgment of the district court for substantially the reasons stated by the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---X

Charles Williams

-against-

ORDER

Yellow Freight Systems, Inc. 93CIV-5491 (KMW)
Local Union # 707, Etc, Et Al

---X

WOOD, D.J.

The plaintiff having failed to communicate with the court in over 6 months, it is hereby

ORDERED, that the above action is dismissed for failure to prosecute pursuant to Fed. R. Civ. P. 41, without prejudice without costs to either party.

SO ORDERED

DATED: New York, New York
November 9, 1994

Kimba M. Wood
United States District Judge

Cohen, Weiss and Simon
Counselors at Law
330 West 49th Street
New York, New York 10036

November 1, 1994

By Telecopier

Allan Laurence Brenner, Esq.
401 Broadway, Suite 1108
New York, New York 10013

Jeffrey Pasek
Cohen, Shapiro, Polisher,
Shiekman and Cohen
12 South 12th Street
PSFS Building
Philadelphia, PA 19107

RE: Williams v. Yellow Freight Systems, et al.
93 Civ. 5491 (KBW)

Gentlemen:

I write to propose the following dates for local 707's deposition of Mr. Williams:

November 21, 22, 23, 1994
December 5, 6, 7, 8, 9, 1994
December 12, 13, 14, 15, 16, 1994

Please let us know as soon as possible which of these dates are acceptable. As before, the deposition will take place at 9:30 a.m. at this firm's offices.

Sincerely,

Joseph J. Vitale

cc: Robert Uhrig

Received, November 2, 1994

C. Vernon Mason Esq,
Attorney At Law

401 Broadway, Ste 1108
New York, New York 10013
Tel. (212) 219-0147

November 8, 1994

Jeffrey Pasek, Esq.
Cohen, Shapiro, Polisher,
Sheikman & Cohen
12 South 12th Street
PSFS Building
Philadelphia, PA 19107

Joseph Vitale, Esq.
Cohen, Weiss & Simon
330 West 42nd Street
New York, New York 10036-6901

Re: Williams v. Yellow Freight Systems
93 Civ. 5491 (KBW)

Gentlemen:

I have received from the court its standard scheduling form order, and have filed in the dates in accordance with our telephone discussions. Please review these dates, and if they are as we agreed, I will submit the order for endorsement by Judge Wood.

With regard to an appropriate date for Mr. Williams deposition, I suggest Monday, December 5, 1994, at 10:00 a.m. at the offices of Cohen, Weiss & Simon. If this is not suitable, please let me know at your earliest possible convenience.

Thank you for your courtesy and cooperation.

Very truly yours,

Allan Laurence Brenner

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NOTICE OF RIGHT TO SUE
(Issued on Request)

TO: Charles Williams
629 Fishkill Avenue
Beacon, NY 12508

FROM: Equal Employment Opportunity Commission
Seven World Trade, 18th Floor
New York, New York 10048

On behalf of a person aggrieved whose identity is CONFIDENTIAL (29 C.F.R. 1601.7(a)).

CHARGE NUMBER	EEOC REPRESENTATIVE
16G-93-5069	CRTIU Unit

TELEPHONE NUMBER
212 748-8412

(See the additional information on the reverse side of this form.)

TO THE PERSON AGGRIEVED:

This is your NOTICE OF RIGHT TO SUE. It is issued at your request. If you intend to sue the respondent(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THIS NOTICE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

☒ More than 180 days have expired since the filing of this charge.

☐ Less than 180 days have expired since the filing of this charge, but I have determined that the Commission will be unable to complete its process within 180 days from the filing of the charge.

☒ With the issuance of this Notice of Right to Sue, the Commission is terminating its process with respect to this charge.

☐ It has been determined that the Commission will continue to investigate your charge.

☐ ADEA - While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you obtained the right to sue under the Age Discrimination in Employment Act (ADEA) when you filed your charge, subject to a 60-day waiting period, ADEA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged discrimination.

☐ EPA - While Title VII requires the Commission to issue a Notice of Right to Sue before you can bring suit under that law, you already have the right to sue under the Equal Pay Act (EPA) (you are not required to complain to any enforcement agency before bringing an EPA suit in court). EPA suits must be brought within 2 years (3 years in cases of willful violations) of the alleged EPA underpayment.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

cc: (to respondent) On Behalf of the Commission

☐ Copy of Charge

Richard B. Alpert, Deputy District Director 6/28/93

Yellow Freight Systems, Inc.
1000 Homestead Drive
Maybrook, NY 12543

No. 97-1211

Supreme Court, U.S.
FILED
FEB 20 1998
CLERK

In The

Supreme Court of The United States

October Term, 1997

State Division of Human Rights on the Complaint of:
CHARLES WILLIAMS,

Petitioner,

- against -

YELLOW FREIGHT SYSTEMS, INC., LOCAL UNION NO. 707, HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS, DOCKMEN AND HELPERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

OPPOSITION TO WRIT OF CERTIORARI

VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C.
Attorneys for Respondents
1501 Broadway
New York, New York 10036
(212) 403-7300

February 20, 1998

Appeal Press - (914) 761-3600 (212) 267-6602 (516) 872-1110 (5703)

5 pp

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QUESTIONS PRESENTED

1. Did the United States District Court for the Southern District of New York abuse its discretion by dismissing petitioner's complaint for having repeatedly failed to abide by the court's orders?

2. Did the district court subsequently abuse its discretion by declining to grant petitioner's motions made under Rule 60(b)(1) of the Federal Rules of Civil Procedure to reinstate his complaint, when the petitioner failed to show, or even allege, as required by the Rule, that excusable neglect had occurred?

LIST OF PARTIES

The parties to the proceeding are:

Petitioner: Charles Williams

Respondents: Yellow Freight Systems, Inc.; Local Union No. 707, Highway and Local Motor Freight Drivers, Dockmen and Helpers International Brotherhood of Teamsters

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CHARLES WILLIAMS,

Petitioner,

- against -

YELLOW FREIGHT SYSTEMS, INC., LOCAL UNION NO. 707, HIGHWAY AND LOCAL MOTOR FREIGHT DRIVERS, DOCKMEN AND HELPERS, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Respondents.

Brief in Opposition of Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

OPINIONS BELOW

The Orders of the District Court are attached respectively at Petitioner's Appendix ("Pet. App.") A-22, A-24 and A-31. The Order of the Court of Appeals for the Second Circuit is at Pet. App. A-28.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Did the United States District Court for the Southern District of New York abuse its discretion by dismissing

petitioner's complaint for having repeatedly failed to abide by the court's orders?

2. Did the district court subsequently abuse its discretion by declining to grant petitioner's motions made under Rule 60(b)(1) of the Federal Rules of Civil Procedure to reinstate his complaint, when the petitioner failed to show, or even allege, as required by the Rule, that excusable neglect had occurred?

STATEMENT OF THE CASE

This Court has repeatedly declined to grant petitions for review coming out of the Second Circuit, where the issues presented in the petition are the same as those presented by this case. Moreover, the Court's attention is especially unwarranted by the instant petition which seeks to question the district court's exercise of discretion in failing to grant a motion to reinstate a complaint when the petitioner failed to comply with the explicit language of the Rule under which he made the motion.

The uncontested facts show that the district court did not abuse its discretion in dismissing plaintiff's complaint; before doing so, the district court over extended itself by repeatedly telephoning petitioner's counsel to inquire about his failure to prosecute

the case and comply with the court's orders and in doing so warned him that the complaint would be dismissed if the inaction continued.

It is also uncontested that in making his motions to reinstate the complaint under Rule 60(b)(1) the petitioner failed to allege that excusable neglect had occurred. Indeed, petitioner admits that he did not provide any excuse for his attorney's repeated failure to obey court orders and communicate with the court in his motions to reinstate his complaint. (Pet. at 13.)

These are the facts. On November 9, 1994, the district court dismissed petitioner's action, without prejudice, pursuant to Rule 41(b) of the Federal Rules of Civil Procedure for failure to prosecute. (Pet. App. at A-31.) Before it dismissed the case, the district court telephoned petitioner's counsel several times to ask why the requested papers were not being submitted as ordered. Finally on October 12, 1994, the court telephoned to warn petitioner's counsel that it would dismiss the complaint if counsel's inaction continued and, the district court again ordered him to submit a scheduling order and discovery plan. (Order, dated July 19, 1996, Pet. App. at A-26.) No scheduling order or discovery plan was ever submitted, and the district court dismissed the complaint.

On July 5, 1995, nearly eight months later, petitioner moved for an order to reinstate the complaint pursuant to Rule 60(b)(1). Petitioner offered no excuse for his former attorney's failure to abide by the district court's orders and prosecute the case. By Order of January 23, 1996, the district court denied the motion to reopen the case.

On February 19, 1996, more than fifteen months after the district court dismissed his complaint, petitioner made a second Rule 60(b)(1) motion to reinstate the complaint. Again, petitioner offered no excuse for his former counsel's neglect. Instead, the petitioner took issue with the district court's conclusion, in its order of dismissal, that former counsel had failed to communicate with the district court.

In support of this argument the petitioner pointed to a letter to respondents' attorneys, dated November 8, 1994, the day before the dismissal, enclosing a proposed scheduling order for their review. However, plaintiff again failed to offer any explanation in support of his motion to excuse his former attorney's inordinate delay in submitting the scheduling order to opposing counsel or excusing his inability to follow through and submit it

to the district court. (Order, dated July 19, 1996, Pet. App. at A-26.)

On October 21, 1997, the Second Circuit affirmed the district court's decisions because the petitioner failed to establish excusable neglect entitling him to reinstatement of his complaint. (Pet. App. at A-28.)

ARGUMENT

A. The United States District Court for the Southern District of New York did not abuse its discretion by dismissing petitioner's complaint for his attorney's repeated failure to abide by the court's orders?

There is no merit to petitioner's contention that the district court abused its discretion by dismissing this matter. This Court has stated that "when the circumstances make such action appropriate, a District Court may dismiss a complaint for failure to prosecute even without affording notice of its intention to do so . . . ." Link v. Wabash Railroad Co., 370 U.S. 626, 633 (1962). In Link, this Court reasoned that a district court must be able to "manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." Id. at 630-31.

This Court further noted that if an action is dismissed for failure to

prosecute and the statute of limitations bars a new action, the proper remedy is against the former attorney in a suit for malpractice, rather than vacatur of the dismissal. Id. at 634 n.10. (emphasis added).

The district court in the instant case provided more care than even required by law. After petitioner's counsel disobeyed the court's orders, the court contacted counsel to warn of possible dismissal. No such notice was required.

B. The District Court Properly Denied the Rule 60(b)(1) Motion Because Petitioner did not Demonstrate, nor Even Allege, Excusable Neglect.

In relevant part, Rule 60(b)(1) provides that:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect . . . .

Fed. R. Civ. P. 60(b)(1).

The Second Circuit has consistently followed this Court's rationale in Link and has repeatedly declined to relieve

clients under Rule 60(b)(1) of the "burdens of a final judgment entered against [them] due to the mistake or omission of [their] attorn[ies] by reason of the latter's ignorance of the law or of rules of the court, or [their] inability to efficiently manage [their] caseload." United States v. Cirami, 535 F.2d 736, 739 (2d Cir. 1976). Petitioner "voluntarily chose [his attorney] as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent." Id. at 740 (quoting Link, 370 U.S. at 740); See Nemaizer v. Baker, 793 F.2d 58, 62 (2d Cir. 1996); see also Samuels v. Northern Telecom, Inc., 942 F.2d 834, 837 n.2 (2d Cir. 1991).

This Court has consistently denied review of petitions coming out of the Second Circuit which challenge the district court's refusal to grant plaintiffs relief from the result of their attorney's acts or omissions. See Teltronics Serv., Inc. v. L M Ericsson Telecomm., Inc. 642 F.2d 31, 36 (2d Cir.), cert. denied, 450 U.S. 978 (1981); United States v. Erdoss, 440 F.2d 1221, 1223 (2d Cir.), cert. denied, sub nom., Horvath v. United States, 404 U.S. 849 (1971).

In any case, petitioner has failed to establish any facts that materially contradict the court's conclusion that plaintiff's former attorney failed to

prosecute the case and communicate with the district court. Thus, as a matter of law, petitioner has given no basis for the case to be reopened.

C. Failure of Petitioner To Personally Receive Notice of The Dismissal Did Not Violate His Right To Trial.

Petitioner's assertion that he was deprived of his right to trial because he did not receive personal notice of the dismissal is also without merit. Pursuant to Rule 5 of the Federal Rules of Civil Procedure, service of notice of entry of final judgment pursuant to Rule 77(d) is made on the attorney, not the party. See Perfect Fit Indus., Inc. v. Acme Quilting Co., Inc., 646 F.2d 800, 809 n.9 (2d Cir. 1981), cert. denied, 459 U.S. 832 (1982). And, in any case, petitioner did get actual notice of the dismissal in time to make his first motion under Rule 60(b)(1) to reinstate his cause of action.

CONCLUSION

The district court did not abuse its discretion and the Second Circuit did not err in affirming the decision of the district court. There is no issue in the instant petition sufficiently significant to warrant review by this Court. For

these reasons, the petition for certiorari should be denied.

Dated: New York, New York
February 17, 1998

VLADECK, WALDMAN, ELIAS
& ENGLEHARD, P.C.

By: _____
LARRY CARY
Attorneys for Respondent
Local Union No. 707
1501 Broadway, Suite 800
New York, New York 10036
(212) 403-7300

On the brief:
Angela A. Burns